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IN THE

SUPREME COURT OF THE UNITED STATES

No. 385

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

vs.

M. E. THOMPSON, STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA,
Appellee.

BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY

CARL H. DAVIS

PHILIP H. ALSTON

T. M. CUNNINGHAM

Attorneys for Atlantic Coast Line Railroad Company.

December 26, 1946.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 385

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

vs.

M. E. THOMPSON, STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA,
Appellee.

BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY.

Statement of the Case.

This case involves the liability of Appellant as one of the joint Lessee of the railroads of Georgia Railroad and Banking Company for income taxes to the State of Georgia assessed under the Income Tax Act of 1931 at 5½% on the net income of certain of the leased lines, which income under the Charter of Lessor is taxable not higher than one-half of 1%. The case turns on the interpretation of the contract contained in the Charter of Georgia Railroad and Banking Company, which has several times been construed by this Court. Appellant believes that the construction placed on this contract by the Supreme Court of Georgia is contrary to the decisions by this Court construing and applying the said contract. The decision of the Supreme Court of Georgia in this case is reported in 38 Southeastern Reporter, (2d) page 774.

There are no disputed facts in this case. Most of the facts are contained in an agreed statement of facts (R. 42).

Georgia Railroad and Banking Company leased its railroad properties to William M. Wadley, May 7, 1881, for a term of 99 years from April 1, 1881, at an annual rental of $600,000. By successive transfers Appellant and Louisville and Nashville Railroad Company eventually became the Lessees, each being the Lessee of a one-half interest in the leased property. The leased properties are operated by the Lessees through the medium of an unincorporated agency designated as the "Georgia Railroad". (R. 42, 46).

Section 15 of the Charter of Georgia Railroad Company (Acts 1833, p. 256), the name of which was changed to Georgia Railroad and Banking Company (Acts 1835, p. 181) provides:

> "The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that, shall be subject to a tax not exceeding one-half percent per annum on the net proceeds of their investments."

This Charter provision is applicable only to the main line of railroad from Augusta, Ga., to Atlanta, Ga., and the branch from Union Point, Ga., to Athens, Ga. (R. 43). This provision of the Charter is hereafter referred to as the "Charter tax limitation" and the lines of railroad covered by it are hereafter referred to as the "Charter tax lines".

The power to lease is conferred by Sections 12 and 14 of the Charter (Acts 1833, pp. 256, 262, 263), a copy of which Sections are attached hereto (Appendix 1).

The State Revenue Commissioner (the predecessor of Appellee) assessed against Appellant deficiency income taxes, for the years 1941, 1942, and 1943, the deficiency being the amount of one-half of the net income from the operation of the Charter tax lines, and the assessment being at the rate of 5½% on this net income. The amount of the deficiency tax assessed for the three years is $179,271.80, with interest to March 5, 1946, of $20,218.13, besides interest from March 5, 1945, on the principal sum at the rate of 1% per month, until paid.

The State Revenue Commissioner assessed similar deficiency income taxes in the same amount against Louisville & Nashville Railroad Company, Lessee of the other one-half interest of the Georgia Railroad (R. 48).

The re-determination of the tax was arrived at by the Revenue Commissioner by treating the Georgia Railroad and all of its branches, as a unit, or system, and no effect was given by him to the Charter, nor was any credit given for the one-half of 1% tax paid by Georgia Railroad and Banking Company (R. 47).

The thing taxed under Section 15 of the Charter is not the rental received by the Lessor, but is the net income from the operation of the Charter tax lines. The tax of one-half of 1% under said Section 15 of the Charter has been returned and paid on that basis for more than 100 years. (R. 41, 47, 68).

The tax is assessed under the Income Tax Act of March 31, 1931, and amendments, (Acts 1931, Ex. Session, p. 24; Acts 1937, pp. 109, 117) now codified in Annotated Code of Georgia, Section 92-3102, the material portion of which is as follows:

> "Every domestic corporation and every foreign corporation, shall pay annually an income tax equivalent to five and one-half per cent. of the net income from property owned or from business done in Georgia as is defined in Section 92-3113." (R. 46).

Appellant duly protested the assessment of said deficiency as allowed by Code of Georgia Annotated, Section 92-8432, (R. 2 to 7 inc.), and upon the protest being overruled and the assessment made final (R. 7, 8), Appellant appealed from the assessment to the Superior Court of Chatham County, as allowed by Code of Georgia Annotated Section 92-8446 (R. 18). The appeal opens up the whole matter to a de novo investigation. (Code of Georgia annotated, Sec. 6-501).

The State Revenue Commissioner of Georgia, in an effort to destroy the tax limitations of the Charters of the Georgia Railroad and Banking Company and of the Augusta and Savannah Railroad and the South Western Railroad Company (which two latter Companies have similar tax limitations to that contained in the Charter of the Georgia Railroad), has started proceedings (a) to tax the Charter tax lines of each of these three Railroad Companies on the ad valorem basis; (b) to tax the rentals received by each of these three Companies from their respective leases, 5½% under the Income Tax Act of 1931; (c) and to tax to the respec-

tive Lessees of each of these three companies the net income from the operation of their Charter tax lines at the rate of 5½% under the Income Tax Act of 1931. (R. 58 to 67 inc.).

The case was heard in the Superior Court by the Judge without a jury and he sustained the appeal and held that the Charter was an irrepealable contract and that the assessment was null and void (R. 29, 30). The State Revenue Commissioner made a motion for a new trial (R. 30), which was overruled (R. 39), and he thereupon took a bill of exceptions to the Supreme Court of Georgia (R. 69). The Supreme Court of Georgia reversed the judgment of the Court below, and in the judgment reversing the Court below, direction was "given that the trial Court vacate its former judgment and enter a judgment denying the appeal of said Company and rendering judgment in favor of M. E. Thompson, State Revenue Commissioner, sustaining the tax assessment as made" (R. 89).

The case is here on appeal from the judgment of the Supreme Court of Georgia, the jurisdiction of this Court being predicated on Judicial Code Section 237 (a) as amended by the Act of January 31, 1928, Ch. 14, Section 1, 45 Stat. 54. The statement as to the jurisdiction of this Court as required by Rule 12 is in the original record.

This Court has noted probable jurisdiction. (R. 128)

ASSIGNMENT OF ERRORS.
(R. 93)

1. The Supreme Court of Georgia erred in sustaining the validity of the said Income Tax Act of March 31, 1931, as amended, under which the taxes

in this case were assessed against Atlantic Coast Line Railroad Company, and in overruling the contention of Atlantic Coast Line Railroad Company, duly made in the pleadings in this case, that the said Act of March 31, 1931, as so applied impaired the contract contained in Section 15 of the Charter of Georgia Railroad Company (Acts 1833, p. 256) the name of which was changed to Georgia Railroad and Banking Company (Acts 1835, p. 181), contrary to Article 1, Section 10, Paragraph 1, of the Constitution of the United States which provides that "No State shall pass any law impairing the obligation of contracts". There was thus drawn in question the validity of a statute of the State of Georgia on the ground of its being repugnant to the Constitution of the United States, and the decision of the Supreme Court of the State of Georgia was in favor of the validity of said Statute.

2. The Supreme Court of Georgia failed to decide that said Section 15 of the Charter of Georgia Railroad & Banking Company was an irrevocable contract, protected by the Contract Clause of the Constitution of the United States, and that the said contract inured in this matter to the benefit of Atlantic Coast Line Railroad Company, the Lessee of the lines of railroad of Georgia Railroad and Banking Company covered by said Section 15 of the Charter, but by-passed this question and erroneously construed the Charter with the purpose and intent to avoid a decision on the question that the Charter was an irrevocable contract with the State of Georgia.

3. The Supreme Court of Georgia erred in holding that the tax imposed by Section 15 of the Charter of Georgia Railroad and Banking Company is a prop-

erty tax and that said Section 15 constitutes no bar to the collection of the income tax under the 1931 Income Tax Act from the net income derived by the Lessee from the Leased Lines covered by the said charter tax limitation.

4. The decision of the Supreme Court of Georgia, that the tax imposed under Section 15 of the said Charter is a property tax, is contrary to the decisions of the Supreme Court of the United States construing this Charter in the cases of *Wright* v. *Georgia Railroad & Banking Company*, 216 U.S. 420, and *Wright* v. *Louisville & Nashville Railroad Company* and *Atlantic Coast Line Railroad Company*, 236 U.S. 687; and the similar charters of South Western Railroad Company and Augusta and Savannah Railroad in the cases of *Wright* v. *Central of Georgia Railway Company*, 236 U.S. 674, and *Central of Georgia Railway Company* v. *Wright*, 248 U.S. 525; 250 U.S. 519. The Supreme Court of the United States in said cases has construed this charter tax as a tax on income and has further held that under said Charter a property tax could not be imposed and that no tax could be imposed except the tax of ½ of 1% on the net income of the Charter lines.

5. The Supreme Court of Georgia is bound to follow the construction put on the Charter by the Supreme Court of the United States, where the question involved, as here, is whether the Act of the State Legislature impairs the obligation of the Charter contrary to the Federal Constitution.

6. The thing taxed under Section 15 of said Charter is the net income of the lines of railroad covered by the Charter tax limitation, whether the net income is earned from the operation of the railroads by the

Georgia Railroad & Banking Company or by its Lessees. The thing taxed is not the rental received by the Lessor. This has been the invariable practice of one hundred years and the decisions of both the Supreme Court of Georgia and the Supreme Court of the United States construing this Charter, are to this effect. The Supreme Court of Georgia has so decided in the case at bar; but has erroneously applied this fact as upholding its construction of the Charter, that the Charter Tax is a property tax, whereas this fact destroys the holding of the Supreme Court of Georgia that the Charter tax is a property tax. The Supreme Court of Georgia erred in not holding that Section 15 of the Charter, taken in connection with the provisions of the Charter conferring the power to lease, contemplates that a tax of ½ of 1% should be the maximum tax imposed on the net earnings from the operations of the railroads covered by Section 15 of the Charter; and that when so taxed the power of the State to tax either the Lessor or the Lessees is exhausted.

7. The Supreme Court of Georgia erred in not holding that the tax provisions of Section 15 of the Charter inured to the Lessees and that the taxation to the Lessees of the net income of the lines of railroad covered by said Section 15 at the rate of 5½% under the said Income Tax Act of March 31, 1931, impaired the obligation of the contract, contrary to the Contract Clause of the Federal Constitution, the same income having been already taxed ½ of 1% under Section 15 of the Charter.

8. The Supreme Court of Georgia erred in ignoring and in not following the decisions of the Supreme Court of the United States in the case of *Wright*,

Comptroller General, v. *Central of Georgia Railway Company*,* 248 U.S. 525, and 250 U.S. 519. In these two cases the Supreme Court of the United States held that it impaired the contracts contained in the Charters of the South Western Railroad Company and the Augusta and Savannah Railroad to tax Central of Georgia Railway Company, the Lessee of these railroads, on its leasehold interest. The Charters of these two Lessor railroads contain substantially similar provisions as to taxation as does the Georgia Railroad and Banking Company Charter. This decision is applicable to the Georgia Railroad and Banking Company and is in nowise distinguishable. The contention of Appellant was that as the leasehold interest of Atlantic Coast Line Railroad Company could not under the authority of this decision, be taxed to it without impairing the obligation of the contract contained in Section 15 of the Georgia Railroad Charter, a fortiori, the income from the leasehold interest could not be taxed without impairing the obligation of Section 15 of the Charter. The Supreme Court of Georgia did not merely overlook these decisions of the Supreme Court because they were pointedly called to its attention both in the briefs and on the oral argument.

9. The Supreme Court of Georgia erred in resting its decision of the case at bar on the decision of the Supreme Court of the United States in *Hale* v. *State Board*, 302 U.S. 95. The errors in this are as follows:

(a) In the Hale case the Statutes of Iowa exempted from taxation certain bonds issued by the State and its subdivisions. The State of Iowa subsequently taxed the interest on the bonds under an income tax

*The correct citation is Central of Georgia Railway Company v. Wright, Comptroller General.

act. The Supreme Court of Iowa held that as there was no income tax act in existence when the bonds were issued, it construed the exemption as not covering a tax on income, and the Supreme Court of the United States followed the decision of the Iowa Court. In the case at bar, Section 15 of the Charter of the Georgia Railroad imposes a tax on income, eo nominee, and limits it to ½ of 1%, so that there is no room for the construction, which the Supreme Court of Georgia puts on the Charter, that the Charter permits a tax on income of 5½% under the Income Tax Act of 1931.

(b) The Supreme Court of the United States followed the construction of the Supreme Court of Iowa, which it was not bound to do; but in the case at bar the Supreme Court of Georgia does not follow the construction of the Supreme Court of the United States of the Georgia Railroad Charter which it is bound to do.

10. In seeking to bring the case at bar within the orbit of the Hale case, the Supreme Court of Georgia states in its opinion that at the time the Georgia Railroad Charter was granted in 1833 there was no general law providing for income taxes. Until the Constitution of 1868 there was no provision as to uniformity of taxation. When this Charter was passed, railroads were a new species of property. Most of the railroad charters which were granted between 1833 and January 1, 1863, (when the Code went into effect which prohibited perpetual charter exemptions) contained the provision for a tax on net income at ½ of 1%. By 1858, when several railroads were finally constructed, the Legislature passed an act taxing all railroads one-half of 1% on their net annual income (Acts 1858, Section 8, p. 104), and this policy was continued in several suc-

cessive Acts. (Act December 14, 1861, p. 80; Section 5; Acts 1868, p. 143; Act October 5, 1868, Section 3, p. 154; Act March 18, 1869, p. 160; Act January 19, 1872, Section 3, p. 276; Act February 20, 1873, p. 65; Act February 26, 1874, Section 3, p. 103). This species of property continued to be taxed on the income basis until February 28, 1874, (Acts 1874, p. 107) when all tax exemptions of railroads were repealed and it was provided that they should all be taxed on the ad valorem basis, which latter Act brought on all the litigation which ensued over these special charters. The Legislature of Georgia, when it passed the Act of 1833, must be presumed to have known the difference between a property tax and an income tax, and it must be presumed that it deliberately chose to tax the net income, whether made by the Lessor or Lessee, and not the property on the ad valorem basis.

11. The Supreme Court of Georgia erred in not holding that irrespective of whether the tax imposed under Section 15 of the Charter of the Georgia Railroad & Banking Company was a property tax or an income tax, that the taxation to Atlantic Coast Line Railroad Company of the net income received by it from the operation as Lessee of the lines of the Georgia Railroad & Banking Company covered by Section 15 of the Charter at the rate of 5½% under the Income Tax Act of March 31, 1931, when the same income had been taxed at the rate of ½ of 1% under Section 15 of the Charter of the Georgia Railroad and Banking Company, impaired the obligation of the Charter contrary to the Contract Clause of the Constitution of the United States. Whether the tax levied under Section 15 of the Charter is defined as a property tax or an income tax, the net income from the operation

of the lines of railroad covered by Section 15 of the Charter, is the thing on which the tax is levied, and it makes no difference, whether the income is earned by the Lessor or the Lessee, as the Supreme Court of the United States has distinctly held that the tax provisions of the Charter inures to the Lessee; moreover, when the tax of ½ of 1% is imposed on the net earnings under the Charter a higher tax cannot be imposed on the net earnings on either the Lessor or the Lessee without impairing the obligation of the contract, contrary to the aforesaid Contract Clause of the Constitution of the United States.

All of the assignments of errors are set forth because it is intended to urge all of them. The argument which follows is not preceded by a summary because the assignment of errors summarizes the argument.

ARGUMENT.

I.

The tax provision in section 15 of the Charter of The Georgia Railroad and Banking Company is an irrevocable contract with the State of Georgia, and is protected by Article I, Section 10, par. 1, of the Constitution of the United States against impairment by subsequent legislation.

This Charter has been decided by both the Supreme Court of Georgia and the Supreme Court of the United States to be an irrevocable contract.

Georgia v. *Georgia R.R. & Bkg. Co.*, 54 Ga. 423.

Wright v. *Georgia R.R. & Bkg. Co.*, 216 U.S. 420;
Affirming—*Georgia R.R. & Bkg. Co.* v. *Wright* 132 Fed. 912.

Wright v. *Louisville & Nashville R.R. Co. et al*, 236 U.S. 687.

Affirming—*Louisville & Nashville R.R. Co. et al*, v. *Wright*, 199 Fed. 454, and *Wright* v. *Louisville & Nashville R.R. Co., et al*, 201 Fed. 1023.

The Charters of Central Railroad and Banking Company of Georgia, Augusta and Savannah Railroad and South Western Railroad Company, which had charters under which there was a limit of taxation on net income of one-half of one percent, have likewise been held by the Supreme Court of Georgia and the Supreme Court of the United States to be irrevocable contracts.

Central R.R. & Bkg. Co. of Georgia v. *Georgia*, 92 U.S. 655.

South Western R.R. Co. v. *Georgia*, 92 U.S. 676.

South Western R.R. Co. v. *Wright*, 116 U.S. 231;

Affirming—*Wright* v. *South Western R.R. Co.* 64 Ga. 783, and *South Western R.R. Co.* v. *Wright*, 68 Ga. 311.

Wright v. *Central of Georgia Ry. Co.* 236 U.S. 674;

Affirming—*Central of Georgia Ry. Co.* v. *Wright*, 206 Fed. 107.

Central of Georgia Ry. Co. v. *Wright*, 248 U.S. 525;

Reversing—*Wright* v. *Central of Georgia Ry. Co.*, 146 Ga. 406. Rehearing granted, 249 U.S. 590; and reaffirmed in 250 U.S. 519.

The tax limitation of Central Railroad & Banking Company of Georgia is contained in Section 18 of its Charter (Acts 1835 p. 217):

The tax limitation of South Western Railroad Company is contained in Section 14 of its Charter (Acts 1845 p. 132).

The tax limitation of Augusta & Waynesboro Railroad (name changed to Augusta & Savannah Railroad, Acts 1856 p. 185) is contained in Section 13 of its Charter (Acts 1838 p. 174).

II.

The history of the previous litigation in the Supreme Court of the United States, construing the Charter of the Georgia Railroad, and kindred Charters.

Many railroads were chartered by the Legislature of Georgia (prior to the Code of January 1, 1863, which prohibited the grant of irrevocable charters) which had tax limitations of ½ of 1% on their net income. All of these Companies have passed out of existence except three—Georgia Railroad and Banking Company, Augusta and Savannah Railroad, and South Western Railroad Company, the railroads of the two latter being leased by Central of Georgia Railway Company.

All railroads in Georgia, whether they had Charter tax limitations or not, were commonly taxed at the rate of ½ of 1% on their net incomes, until the Act of February 28, 1874, (Acts of 1874, p. 107), the title of which Act is "An Act to amend the tax laws of this State so far as the same relate to railroad companies, and to define the liabilities of such companies to taxation, and to repeal so much of the Charters of such companies, respectively, as may conflict with the provisions of this Act". This Act provides that the railroads should be taxed as other property of the

people of the State, (Codified, except as to title, Code of Georgia Ann., Secs. 92-2602, 2603). This Act brought on all the litigation over these Georgia railroad Charters which subsequently ensued.

In *Wright* v. *Georgia Railroad & Banking Company*, 216 U.S. 420, affirming 132 F. 912, the State of Georgia sought to tax Georgia Railroad & Banking Company with a franchise tax, and also sought to tax the said Company with the increased value of its property due to additions and betterments. This Court held in this case, that the attempted tax would violate the Charter of the Company, that its property was exempt from taxation, and that the Company was not subject to any form of taxation except the tax of ½ of 1% on the net income, and that this tax would exhaust the power of the State to tax.

The cases of *Wright* v. *Louisville & Nashville Railroad Co., et al.*, 236 U.S. 687, affirming 199 F. 454, and 201 F. 1023, and *Wright* v. *Central of Georgia Railway Company*, 236 U.S. 674, affirming 206 F. 107, were companion cases. Central of Georgia Railway Company was the Lessee of Augusta and Savannah Railroad and South Western Railroad which had Charter tax limitations similar to that of the Georgia Railroad. The Lessors were not parties to these cases. The contention in both cases was that the Lessees had long term leases and were the virtual owners of the properties, in view of which the State attempted to tax the Lessees with the fee of the properties. In both cases the Supreme Court dwelt on the power to lease contained in the Georgia Charter and contained in the Augusta and Savannah Charter, and the Court held in the Central of Georgia case (p. 679) that "No

change in the manner of tax exemption was expected to follow from the demise of the road, any more than it would have followed from the admission of another carrier to partial rights or of an individual to carry his own goods", and made the same observation in the Georgia Railroad Charter case (p. 689). These two cases did not turn on the Fourteenth Amendment. They held specifically that the Lessees were protected by the Charter and that the Charter inured to the Lessees; and that the Lessor already had been exhaustively taxed in the manner pointed out by the Charter, and the Charter contract prevented the fee from being taxed to the Lessees.

These two cases involving the taxation of the fee to the Lessees were followed by the case of *Central of Georgia Railway Company* v. *Wright*, 248 U.S. 525, reversing 146 Ga. 406. The contention in this case was that the leasehold interest of the Central of Georgia Railway Company in the Augusta and Savannah Railroad and in South Western Railroad Company was property under the laws of Georgia, and was taxable as property. The Court decided in this case (p. 526) that the case "presents another attempt to accomplish, by a change in form, what in Wright v. Central of Georgia Railway Company, 236 U.S. 674, was held to be an unconstitutional result", and that the Lessee was protected by the Charter from being taxed with the leasehold interest, although the leasehold interest was property of the Lessee. At the end of his opinion in that case Mr. Justice Holmes says (248 U.S. at page 527): "The charter contracts in question are of a kind that goes back to the time when railroads were barely beginning, and that would not be likely to be repeated, *but of course will be carried out by the state*

according to what was meant when they were made". (Italics ours). A re-hearing was granted in this case, *Central of Georgia Railway Company* v. *Wright*, 249 U. S. 590, as to the charter tax under the Charter of the South Western Railroad. On the re-hearing, *Central of Georgia Railway Company* v. *Wright*, 250 U.S. 519, the Court re-affirmed its decision in 248 U.S. 525 as to the South Western Railroad.

That decision in 1919 concluded any attempt on the part of the State to tax the Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company, as Lessees of the Georgia Railroad, with their leasehold interest, because the situation in the Georgia Railroad leases was exactly the same as the situation in the Augusta and Savannah and South Western Railroad Company leases. If the leasehold interest was not taxable to the Lessees and if they were protected by the Charter from being taxed ad valorem on the leasehold interest, it follows, a fortiori, that they cannot be taxed 5½% on the income from the leasehold interest.

The case at bar is a part of a studied purpose of the taxing authorities of the State of Georgia after the lapse of more than twenty-five years, to avoid and evade the Charter tax limitations of the Charters of the Georgia Railroad and Banking Company, Augusta and Savannah Railroad and South Western Railroad Company. The State is now proposing to tax the Georgia Railroad and Banking Company, the Augusta & Savannah Railroad, and the South Western Railroad on their properties on the ad valorem basis, just as though the Charter tax limitations had never existed. (R. 67). The State also proposes to tax the

Georgia Railroad and Banking Company (R. 60), Augusta and Savannah Railroad (R. 58), and the South Western Railroad (R. 62) 5½% on their respective rentals, in addition to the Charter tax of ½ of 1% on the net income of the Charter tax lines.

III.

It has been the invariable practice for more than 100 years to tax the net income of the Charter tax Lines and not the rentals paid by the Lessee.

In the stipulation of facts in the case of *Wright* v. *Louisville & Nashville RR Co. et al.*, 236 U.S. 687, the following appears:

> "Taxes paid by the Lessor — The Lessor since the lease, during the thirty years as before the lease, has annually returned the net earnings of the chartered property — not the rental — for taxation and has paid to the State one half of one percent on the net earnings and not the rental." (R. 68). See also evidence of H. E. Judge (R. 41).

In *Goldsmith v. Augusta and Savannah Railroad*, 62 Ga. 468, it was held (p. 472) "the income contemplated by the Charter is not the annual rental, but the earnings of the road".

In *Georgia R.R. & Bkg. Co. v. Wright*, 132 Fed. 912, (decided in 1904) Judge Newman said "The State has for sixty years or more allowed the Company to return its net earnings and pay a tax thereon of one-half of 1% without objection".

In *Louisville & Nashville R.R. Co., et al.* v. *Wright*, 199 Fed. 434, Judge Newman says:

> "The very way in which these two things are placed in the charter seems to indicate that, even though operated by others, the taxes imposed should be upon the income, whether the income came from the operation of the road by the chartered company or by others to whom it might rent or farm out the privilege of transportation." (pp. 437-8).

The scheme of the Charter as interpreted both by the earlier decisions of the Supreme Court of Georgia and by this Court is that the net income of the Charter tax lines should be taxed no matter who earned it, whether Lessor or Lessee, and that when this tax is paid, the power of the State to tax further or differently to either Lessor or Lessee is exhausted.

IV.

Under the Georgia Railroad Charter the tax is levied exclusively on the net income of the Charter tax lines. The property is exempt from taxation. When the tax of ½ of 1% is levied, the power of the State to tax further is exhausted.

In *Georgia Railroad & Banking Company* v. *Wright* 132 Fed. 912, the State sought to impose a franchise tax on the Company and also to tax it with the increased value of its property due to additions and betterments and other causes. Judge Newman, in opening his opinion in this case, states the Complainant is seeking " a decree adjudging that it is not liable for a property tax on its railroad, or any tax on its franchise, and that the only tax for which it is liable is a tax to the State

of one-half of 1 per cent. on the net earnings of its investments". And then Judge Newman goes on and decides (p. 919): "The scheme of taxation provided for this Company in its charter is a broad one, and, in my judgment, the tax of one-half of 1 per cent. on its net earnings embraces all the taxation it was intended should be exacted of this Company * * It is clear that it was the intention of the Legislature to provide a full and complete system of taxation for this corporation, and that it embraces its whole liability for taxation."

In *Wright* v. *Georgia Railroad & Bkg. Co.*, 216 U.S. 420, which affirmed Judge Newman's decision in 132 F. 912, the Court held:

> (p. 422) "The Court below sustained the contention of the railroad company, and held that the scheme of taxation found in the charter of the company was of inviolable obligation and enjoined any method of taxation conflicting with the stipulations of the charter."
>
> (p. 426) "That the only mode of taxation stipulated for after the period of total exemption is a tax upon the net income of the company's property is seemingly the plain and obvious meaning of this contract. That this is the way in which it has been read and interpreted by everybody who has had to do with the matter of taxation in an official way since 1845, when the railroad seems to have been finished, affords strong evidence that this construction accords with the intent of the charter."
>
> (p. 430) "After all, the precise question is, whether the legislative purpose, as expressed, was that the railroad incorporated should pay no tax except one based upon net profits of operation, or was it the intention that a specific amount of capital only should be so relieved? Undoubtedly, the State did not intend that any

other capital than that authorized and invested directly in this specific railroad should be immune. That is plain by the express limitation of the charter. But is there any contingency under which this particular railroad is to be subject to any other taxation than one measured by the amount of its net profits?"

(pp. 431, 432) "This plan of tax upon net earnings is quite inconsistent with any other form of taxation, and is absolutely independent of any question as to whether the property thus taxed only upon its profits should have a less or greater value than the capital invested. A tax upon earnings is a tax which at last covers and includes, unless double taxation is intended, all property necessarily held and used to make that income, including the enjoyment of its franchises. *It is not to be presumed, in the light of the public policy of the time, that the State intended that this pioneer railroad should be subjected to any form of taxation of property which produced the taxable income* * * * (Italics ours) We are, therefore of opinion that this property is not subject to any other method of taxation than that of the special system stipulated for by the contract, and that the act of the Georgia Legislature, in so far as it provides for an ad valorem tax upon any part of this invested capital of the Georgia Railroad and Banking Company, does impair the obligation of the contract. But it is said that the tax, so far as imposed upon the franchise of this company, is not in derogation of the charter, and that the decree below should be modified in this particular. *If we are right in construing the tax as one upon net income as a substitute for a property tax, the franchise may no more be taxed than any other property appropriate to the operation of the road. When the State gave up the right to levy*

and collect a property tax and to take in substitution a tax upon the annual net profit, it gave up the right to tax the franchise of the company as certainly as it gave up the right to tax its railroad:" (Italics ours).

The Court, in referring to the tax limitation of the Charter, describes it as (p. 436) *"the immunity from any other tax than one based upon a given per cent. of annual net profits"*. (Italics ours).

V.

This Court has held that this contract inures to the Lessees, of which Appellant is one.

The Charter is an umbrella over the Lessees as well as the Lessor. When the tax of one-half of one per cent is paid on the net income of the Charter tax lines the power of the State to tax is exhausted. We wish to emphasize the fact that the thing which is taxed is the net income yielded by the Charter tax lines, whether that income is made by the operations of the Lessor or Lessees.

The protection of the Lessee is necessary to make good that promised the Lessor. Manifestly if the Lessee is not protected by the Charter the Lessor's ability to rent its property is materially affected. If the State can tax the same net income which has already been taxed under the Charter one-half of one per cent. another 5½% under the Income Tax Act that which is promised the Lessor is denied, although the 5½% tax may be paid by the Lessee, because the Lessee took the lease on the faith of the contract. The State cannot double tax without violating the Charter.

In *Wright v. Louisville & Nashville Railroad Co., et al.*, 236 U.S. 687, which involved the question whether the State could tax the Lessees with the fee of the property, the Court first called attention to the fact that the 12th Section of the Charter of the Georgia Railroad authorized it to rent the whole or any part of its property or to let vehicles of others pass over its railroad, and the Court then said (p. 689) "So that the State has covenanted that the Company's property shall be exempt from tax except upon its income *which it is authorized to make in any of three ways* (Italics ours) * * * For the reasons given in the other case (Wright v. Central of Ga. Ry. Co., 236 U.S. 674), we cannot believe that if the Company saw fit to gain 'the net proceeds of their investments' (to one-half of one percent of which their tax was limited), by letting the whole road instead of allowing others to introduce carriages, *the Statute silently opened the right to resume as against the Lessee all that had been renounced as against the Lessor*" (Italics ours). And again at page 690 the Court said: "If the fee of the roads is taxable to no one while the liability of the Lessor to the above mentioned one-half of one per cent, remains, an attempt to collect a tax upon the fee from the plaintiffs is an attempt on the part of the State to tax the leased property which was completely beyond the reach of its taxing power except in so far as permitted by the contract, the obligations of which could not be impaired without a violation of the contract clause of the Constitution of the United States."

In the companion case of *Wright* v. *Central of Georgia Railway Co.*, 236 U.S. 674, which involved the taxation of the fee of the Augusta and Savannah

and South Western Railroads, to their Lessee, Central of Georgia Railway Company, the Court said (p. 679):

> "The foregoing view of Section 16 would lead us to believe that no change in the matter of tax exemption was expected to follow from the demise of the road, any more than it would have followed from the admission of another carrier to partial rights, or of an individual to carry his own goods. But that is only an introduction to further considerations. We cannot suppose that the Legislature meant either to practice a cunning deception or to make a futile grant. Therefore, we are unable to read the charter as making the exemption vain by reserving to the State an unlimited right to impose upon the Lessee all that it had renounced as against the lessor. For that was to give notice to the parties, if they were supposed to know the law, that the exemption would be lost if the income was earned in one of the contemplated ways—or, if they were supposed ignorant, was to invite them to a bargain that was to have an unexpected and disastrous result."

And again the Court said on pages 679 and 680:

> "We see no ground for believing that there has been any change in the attitude of the State toward the pioneer enterprises that it was encouraging a few years before. We still cannot suppose that it was inviting the lessors to lose the benefit of their exemption or the lessees to find themselves entrapped with a burden made possible only by accepting the invitation of the act * * * We construe those statutes as making the fee exempt from other taxation than that provided for, in favor as well of the lessee as of the lessor—the protection of the lessee being necessary in order to make good that promised to the lessor".

In *Central of Georgia Railway Company* v. *Wright*, 248 U.S. 525, in which the State attempted to tax Central of Georgia Railway Company with its leasehold interest in the Augusta and Savannah Railroad and the South Western Railroad Company, the Supreme Court said (h.n.1):

> "The same reasons which lead this Court to decide that the tax exemptions in the special charters of the Augusta and Savannah and the South Western Railroads inured to the Central of Georgia Railway as their lessee and precluded taxing the latter upon the fee of the leased property (Wright v. Central of Georgia Ry. Co., 236 U.S. 674) invalidate an attempt to evade the charter contracts by a tax of the leasehold interests."

In the body of the opinion the Supreme Court referred to the fact that the previous case in 236 U.S. 674 was an attempt to tax the Lessees with the fee of the two leased lines, and said, (p. 527):

> "The taxes now attempted to be levied are upon the leasehold interests of the Lessee in the same roads and it is argued that, if the leases produce a profit in excess of the rental, the value is required to be taxed by the Constitution of the State. But the Constitution was subsequent to the charters that created the exemption and must yield to them if they apply to the present attempt. We are of opinion that, although the decision in the former case necessarily was confined to the question before the court, the reasoning applies with equal force to that now before us. The cases of Rochester Ry Co. v. Rochester, 205 U.S. 236, and Jetton v. University of the South, 208 U.S. 489, were

urged as opposed to the conclusion reached but were thought not to control in view of the exceptional facts and language that had to be considered, as was recognized in Morris Canal & Banking Co. v. Baird, 239 U.S. 126, 132. We must follow the precedent that was established after full discussion and with recognition of the difficultjes involved."

A re-hearing was granted in *Central of Georgia Railway Co.* v. *Wright,* 249 U.S. 590, as to the South Western Railroad, and in *Central of Ga. Ry. Co.* v. *Wright,* 250 U.S. 519, the decision as to the South Western Railroad in 248 U.S. was re-affirmed.

The decision of the Supreme Court of Georgia in *Wright v. Central of Ga. Ry. Co.,* 146 Ga. 406, which was reversed in *Central of Georgia Ry. Co.* v. *Wright,* 248 U.S. 525, and 250 U.S. 519, set at rest the question that a leasehold interest under the law of Georgia is property in the hands of the Lessee, and under the Constitution of the State of Georgia is taxable to the Lessee. If the Charter is protection to the Lessee against taxing the Lessee with its separate property interests in its leasehold, then why is not the Charter a protection against taxing the Lessee 5½% on the income from the Charter tax lines under the Income Tax Act of March 31, 1931? For the very same reason that the leasehold is protected by the Charter, the income derived from the Charter tax lines covered by the lease is, a fortiori, protected.

The State of Georgia was concluded by the decision in 248 U.S. 525 from attempting to tax the leasehold interest of the Lessees of the Georgia Railroad, because precisely the same questions were involved. So that

the cases in 248 U.S. 525 and 250 U.S. 519 are authority in this case, which was binding on the Supreme Court of the State of Georgia.

The power to lease is embedded in the Georgia Railroad charter, as it is in the Augusta and Savannah charter; and as construed by this Court, the lessees take under the charter, which contemplates that when the net income from the charter tax lines, whether made by the lessor or the lessee, is taxed at ½ of 1%, it is exhaustively taxed and cannot be further taxed either to the lessor or the lessee.

VI.

The Supreme Court of Georgia did not follow the construction put by the Supreme Court of the United States on this and kindred charters.

The decisions of the Supreme Court of the United States construing this particular contract to determine whether subsequent legislation is violative of its provisions in view of the Contract Clause of the Federal Constitution are controlling on the Supreme Court of Georgia. No one doubts this proposition. The Supreme Court of the United States leans to accept the construction of such a charter by the State Courts unless the construction of the State Court is manifestly wrong. But when the Supreme Court has construed such a contract, the Supreme Court of the State is not at liberty to put a different construction on the contract. But that is just what the Supreme Court of Georgia has done in this case. In its opinion in this case the Supreme Court of Georgia says (R. 81):

> "If it be conceded that the charter provision referred to is valid, that the legislative branch of the government had the legal power thus to sur-

render a part of the sovereignty of the State and thereby tie the hands of all future legislatures, in so far as legislating freely upon the question of taxation of this corporation, and if it be conceded that the constitutional inhibition against the inclusion, in the body of the act, of matter different from and foreign to the subject embraced in the caption did not render this act void — *we come, aft[illegible] to the plain provision of the charter which [illegible] with and is confined to the subje[illegible] property tax*, unrelated to the question we [illegible] validity of the corporation for [illegible] an income tax under the existing laws of the State." (Italics ours.)

This misconception by the Georgia Court of the meaning and purpose of the charter contract as it has been interpreted and applied by this Court is the fundamental error in the decision of the Georgia court.

This Court, in *Wright, Comptroller* v. *Georgia R. & Bkg. Co.*, 216 U.S. 420, affirmed the decree of the lower court which had, in its opinion stated (132 Fed. at p. 919):

> "The scheme of taxation provided for this company in its charter is a broad one, and, in my judgment, the tax of one-half of 1 per cent. *on its net earnings embraces all the taxation it was intended should be exacted of this Company.*" (Italics ours).

and, by its decree,

> "ordered, adjudged and decreed that defendant be perpetually enjoined from levying and collecting any taxes, State, County or municipal from said corporation not in accordance with this decree."

This Court, in the first paragraph of its opinion states (216 U.S. at page 422):

> "The court below sustained the contention of the railroad company and held that the scheme of taxation found in the charter of the company was of inviolable obligation, and enjoined any method of taxation conflicting with the stipulations of the charter; from this decree the comptroller has appealed."

This Court affirmed the decree of the lower court and in the course of its opinion said:

> "That the *only* mode of taxation stipulated for after the period of total exemption is a tax upon the *net income* of the company's property is seemingly the plain and obvious meaning of this contract." (216 U.S. at page 426. Italics ours.)

and, again, said

> "It is not to be presumed in the light of the public policy of the time, that the state intended that this pioneer railroad should be subjected to any form of taxation of property which produced the taxable income." (216 U.S. at p. 432.)

Apparently overlooking this decision by this Court, the Georgia court, in its opinion, says:

> "Had it been intended that the corporation as a legal entity should forever be free from any sort or form of taxation except the one-half of one per cent as therein provided, it would have been a simple matter to have so provided and thus to have made clear such an intent."

That such intention was perfectly clear to the Attorney General of Georgia and the other eminent counsel for the Comptroller General of Georgia, is shown in the opinion of *Judge Newman in the case of Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company v. Wright, Comptroller General,* reported in 199 Federal 454, where, after citing the decision reported in 216 U.S. 420, above referred to, the opinion shows that counsel for the Comptroller General stated in their brief:

> "It is conceded by the Comptroller General that at the time the state incorporated the Georgia Railroad and Banking Company the Legislature had the power to make, and did make, a contract with the Georgia Railroad and Banking Company never to tax that company in excess of the rate fixed in the charter, to-wit, one-half of 1 per cent. on its net income, and that so far as that company is concerned that it has an irrevocable contract with the state."

citing the case in 216 U.S. just mentioned.

And in the opnion by Mr. Justice Holmes in *Wright v. Louisville & Nashville R.R. Co.* affirming the lower court, reported in 236 U.S. 687, it is stated:

> "By its charter granted on December 21, 1833, the stock of the company and its branches is *subject only* to a 'tax not exceeding one-half 1 per cent. per annum on the net proceeds of their investments' Sec. 15. This language is interpreted and held to constitute a binding contract in *Wright* v. *Georgia R. & Bkg. Co.*, 216 U.S. 420. So it is admitted that the present tax could not be levied on the lessor." (236 U.S. at p. 688-689). (Italics ours.)

It is submitted that this Court has made it as clear as it could be made by human language that, by intention of the Georgia Legislature, the charter tax is an income tax, that no higher income tax nor any other kind of tax can be assessed against the Lessor as a legal entity, and that by reason of the language of the charter this tax provision inures to the Lessees, and yet we find the Georgia Court, after beginning a paragraph in its opinion with the words:

> "We are not unmindful of certain language of the Federal Courts indicating that those courts regarded the tax referred to in this charter provision as an income tax." (R. 82).

proceeding to hold

> "That section 13 of the charter relates only to a property tax" (R. 83)

and, in the face of these decisions by this Court, to state, at the end of that same paragraph, that Georgia Railroad and Banking Company, in paying year by year the charter tax of one-half of 1 per cent on income

> "**paid the taxes on its property in conformity with the provision of its charter because it recognized its legal obligation for the payment of property taxes upon its own property ****" (R. 84).

It is submitted that a more complete misconception of, or—if it be not a misconception—a more determined refusal to be bound by, the decisions of this Court construing and applying this charter contract, could not be shown.

VII.

The Charter tax is not a property tax. It is an income tax.

Although the Supreme Court of the United States has explicitly decided that the Charter Tax is a tax

on income; that this is the only mode of taxation permitted under the charter; that the income tax exhausts the power of the State to tax; that a franchise tax (which is a property tax) could not be imposed; that additions and betterments could not be taxed or any increase otherwise in the value of the property, the Supreme Court of Georgia has, nevertheless, construed the Charter Tax as a property tax. The decisions of the Supreme Court of the United States construing this charter are authority which the Supreme Court of the State of Georgia is bound to follow. The Supreme Court of Georgia, having arrived at the conclusion that the tax is a property tax, then rests its opinion on Hale v. State Board, 302 U.S. 95. We point out hereafter that the Hale case is inapplicable.

Income may be derived from physical property, or from securities, or from individual effort, or it may be derived from the use of physical property. The income tax imposed by the Georgia Railroad charter contemplated that the Railroad would be worked by someone and that the net proceeds of its operation was the thing which the charter aimed to tax. The fact that the income is made from property does not make the tax thereon a property tax. When the charter of the Georgia Railroad was written, in referring to income, necessarily the income spoken of was the income of particular property. This Court has decided that the income might be made by either the lessor or lessee and that the demise of the railroad did not affect the charter tax.

In the case of *Featherstone* v. *Norman*, 153 S.E. 58; 170 Ga. 370, the Court held that income was not property in the sense in which that term is used in the Consti-

tution of the State, requiring all property to be taxed uniformly. The Court said (at p. 393): "So both the property from which the income comes, and the income itself, are subject to separate assessments for taxation. The two are separate and distinct things. The taxation of one is not the taxation of the other. The assertion that the tax on one is a tax on the other is a fanciful conceit to which we cannot agree." This quotation fits our case. We say it is a fanciful conceit to say that the charter tax of ½ of 1% is a property tax and not an income tax.

In *Wright* v. *Georgia Railroad & Banking Company*, 216 U.S. 420, this Court, after deciding explicitly that the property of the Georgia Railroad was exempt from taxation, and that the only method of taxation under the charter was a tax on net income, said (at p. 432): "If we are right in construing the tax as one upon net income as a substitute for a property tax, the franchise may no more be taxed than any other property appropriate to the operation of the road. When the State gave up the right to levy and collect a property tax and to take in substitution a tax upon the annual net profit, it gave up the right to tax the franchise of the Company as certainly as it gave up the right to tax its railroad."

The Supreme Court of Georgia in its opinion in this case quoted the first of the two sentences quoted above from this Court's opinion in 216 U.S., and follows this quotation with this statement: "It is obvious from the language of the Supreme Court, just quoted, that the only question then being considered by that Court was whether or not the property of the Railroad could be further taxed". This decision of the Supreme

Court of Georgia is a palpable misconstruction of the decision of the Supreme Court of the United States. The Supreme Court of the United States in 216 U.S. definitely and unequivocally decided that the property was exempt from taxation under the charter, and that the only form of taxation permissible under the charter was a tax limited to one-half of 1% on the net income, and that this tax was exhaustive of the power of the State to tax.

If the Charter tax on income is a substitute for a property tax, then it clearly is not a property tax. It could not at the same time be a property tax and a substitute for a property tax.

As we have further pointed out, the tax is not levied on the net earnings of the Lessor (i.e., the rentals), but is levied on the net earnings from the operation of the lines which are covered by the tax limitation of the Charter. The tax has no relation whatever to the value of the property but is, as it has been construed for 100 years, a tax on the net earnings of these particular lines, irrespective whether the earnings are made by the Lessor or the Lessee.

In *State* v. *Western and Atlantic R.R. Co.*, 136 Ga. 619, the Court calls attention to the Act of the Legislature of Georgia authorizing the lease of the road, which act provided that the Lessee or Lessees should pay "tax upon *their income* as is now paid by Central Railroad & Banking Company". (p. 620). The Court also refers to the tax as an "income tax" at page 625, and also in the first head note. The income tax provided by the Charter of Central Railroad & Banking Company (Sec. 18 Act of 1835, p. 217) is identical with the income tax under the Georgia Railroad Charter.

There is a long line of cases decided by this Court which hold that a franchise or privilege tax may be *measured* by the entire income, although some of the income is derived from non-taxable property, as, for instance, *Flint* v. *Stone Tracy Co.*, 220 U.S. 108; *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Mass.*, 6 Wall. 611; *Home Ins. Co.*, v. *New York*, 134 U.S., 594; *Pacific Co.* v. *Johnson*, 285 U.S. 481.

But in this case the Charter contract protects the income from the charter tax lines from being taxed more than one-half of one per cent per annum and the exemption runs in favor of the Lessee as well as of the Lessor.

We argue hereafter that, whether the Charter tax is called a property tax or an income tax, the tax imposed on the Lessee in this case violates the charter.

VIII.

Income taxes were habitually levied on railroads in Georgia until the Act of 1874; and there is no room for the interpretation of the Supreme Court of Georgia that the Charter tax was a property tax.

The Supreme Court of Georgia first reaches the conclusion that this charter tax is a property tax (a conclusion which is contrary to the interpretation put on the charter by the Supreme Court of the United States). Then the Supreme Court of Georgia states (R. 82) "A number of railroad charters existing at the time or subsequently granted, contained similar provisions for taxation, but there existed in this State at that time no general law providing for income taxes. It was almost a century thereafter before the Legislature enacted our present income tax statute". From

these premises the Supreme Court of Georgia draws the final conclusion that as the tax was a property tax, and that at the time income taxes were not known in the law of Georgia, that, therefore, it cannot be presumed that the State of Georgia intended to exempt either the lessor or lessee from income taxes. On these erroneous premises the Supreme Court of Georgia brings the case within the orbit of the Hale case.

We have already, we think, demonstrated the proposition that this charter tax was not a property tax. We submit in Appendix III to this brief a list of the railroads which had tax limitations in their charters of one-half of one per cent on their net income. The State of Georgia did not make the tax inadvisedly a tax on income. It obviously intended that these railroads should all of them be taxed on their income.

The Constitution of Georgia of 1798 was the Constitution in effect when this Charter was passed. There was no provision in this Constitution or in any subsequent Constitution of the State of Georgia until 1868 as to uniformity of taxation; nor was there any requirement that property should be taxed ad valorem or in any other particular manner, and under these old Constitutions various kinds of taxes were imposed in Georgia, even real estate was not taxed uniformly. A general income tax act was passed to cover the period from April 1, 1862, to April 1, 1863 (Acts 1863, p. 176), and another general income tax act was passed covering the period April 1, 1863, to April 1, 1864 (Acts, Extra Session 1864, p. 80). These Acts were repealed by Section VII of the Act of December 15, 1866, (Acts 1866, p. 166).

In 1833 railroads were a new species of property and in the case of the first railroads which were chartered in Georgia, the State granted them special charters under which they were to be taxed one-half of one per cent on their net incomes. Other railroads incorporated under the laws of Georgia had no special charter tax limtation; but, nevertheless, until 1874 all railroads in Georgia were habitually taxed one-half of one per cent on their net income. We have attached to this brief Appendix II which contains extracts from the various acts taxing railroads in the State of Georgia and under substantially all of these acts, all railroads were taxed one-half of one per cent on their net earnings. It cannot be argued that the taxes imposed by these Acts recited in Appendix II are property taxes. They are income taxes. In one or two instances recited in Appendix II the State departed from its practice of taxing railroads on income and taxed them on the basis of the value of their property. But, generally speaking, the method of taxation down to 1874 was the income basis. The Act of February 28, 1874, (Acts 1874, p. 107) repealed the Income Tax Acts and provided that thereafter the railroads should be taxed on the value of their property "as other property of the people of the State" is taxed.

The decision of the Supreme Court of Georgia (R. 84) refers to the decision of *Mayor, etc., of Savannah* v. *Hartridge*, 8 Ga. 23, which draws a distinction between income taxes and property taxes. This case arose in 1849. At this time, although several railroads had been chartered previously there were none of them in operation, and the first general act in Georgia on the subject of taxation of railroads, is the Act referred to in Appendix II as the Act of February 1, 1850

(Acts 1850, p. 378) which mentions only three railroads—the Georgia Railroad, the Central Railroad, and the Macon and Western Railroad; two of which had charter tax limitations of one-half of one per cent on their net income, and the third did not. The question in the case of Savannah v. Hartridge, 8 Ga. 23, was whether the charter of the City of Savannah was broad enough to authorize it to impose income taxes.

The Supreme Court of Georgia in its opinion in the case at bar, says (R. 85), referring to the decision of the Supreme Court of Georgia in 8 Ga. 23: "While that decision was rendered several years after the enactment of the Charter here involved, it must be assumed that the Legislature, when enacting this Charter, was acquainted with the fact as there recited that 'writers on political economy as well as the tax laws of all governments', thus divided the forms of taxation and adhered to the rule that where one or more of the forms of taxation are treated or acted upon the other is never intended".

Indulging the presumption (as the Supreme Court of Georgia says we may) that the Legislature of Georgia when it granted this charter knew the distinction between income taxes and property taxes, the Legislature carefully and specifically laid the tax on net income. It definitely intended, as to this new species of property, an income tax and not a property tax, and over a series of succeeding years it taxed all railroad companies one-half of one per cent on their net earnings, until 1874 when it reversed its policy and thereafter provided that they should be taxed on value of their property "as other property of the people of the State". That the Legislature intended to impose

an "income tax" when it granted this charter and not a "property tax" is not susceptible of any doubt, and the Supreme Court of the United States in construing this charter has repeatedly so held.

IX.

It makes no difference whether the Charter Tax is called by the Court below a Property Tax or an Income Tax. In either event the Charter is impaired by taxing the net income from the Charter tax lines to the Lessor or the Lessees at 5½% under the Income Tax Act of 1931.

We have demonstrated that under the Charter the property is exempt from taxation, that the income under the Charter cannot be taxed higher than ½ of 1%, that the Charter inures to the Lessees, that the leasehold interest of the Lessees cannot be taxed to the Lessees without violating the Charter, and that all of these questions have been definitely decided by this Court. We maintain that it logically and necessarily follows that the net income from the Charter tax lines cannot be further taxed 5½% to the Lessees without violating the Charter.

Just why it should violate the Charter to tax the leasehold interest to the Lessees and not violate the Charter to tax to the Lessees the income from the leasehold is impossible to explain. It does not make any difference whether the tax levied under the Charter is defined as a property tax or an income tax, the impairment of the Charter is the same in substance, kind and extent.

We understand, of course, that a person can be taxed on his property and at the same time taxed on the income from the same property, and that although this may be double taxation, that it is legally permissible,

because there is no statute or constitutional provision against double taxation. But here we are dealing with a contract. The State cannot tax the Georgia Railroad ½ of 1% under the Charter and then tax the Georgia Railroad 5½% in addition under the Income Tax Act of 1931. The Charter prohibits a tax *higher* than ½ of 1%. (132 Fed., 912, 915).

If we are right in the proposition that the Charter tax provision inures to the Lessees (as has been decided by this Court), then it makes no difference whether the Charter tax is a property tax or an income tax, because the result is that the net income under the Charter, whether earned by the Lessor or the Lessees can not be taxed higher than ½ of 1%.

X.

Rochester Railway v. Rochester, 205 U. S. 236, and kindred cases, distinguished.

There is no transfer or assignment of the property in this case; it is merely a case of lease authorized by the Charter.

The Supreme Court of the United States has held in the cases hereinbefore cited, that under the peculiar provisions of these Georgia Charters granting tax limitations, the demise of the railroads to the lessees did not affect the charter limitations, and that they inured to the lessees, and in its opinions distinguished the cases of:

Rochester Ry. v. *Rochester*, 205 U.S. 236.
Jetton v. *University of the South*, 208 U.S. 489.
Morris Canal Co. v. *Baird*, 239 U.S. 126.

The Rochester case and the Morris Canal Company case both decided that the grant of immunity from taxation was personal to the owner of the property to

whom the immunity was granted, and the immunity could not be transferred. The Supreme Court in *Wright* v. *Louisville & Nashville R.R. et al.*, 236 U.S. 687, 690, (which involved the taxation of the Georgia Railroad to the Lessees), said:

> "Thus the particular features of the case in hand take it without the rule applied in Rochester Railway v. Rochester, 205 U.S. 236, and other kindred cases, from which we have no purpose to depart."

In *Central of Georgia Railway Company* v. *Wright*, 248 U.S. 525, 526 (which was a case which involved taxing the leasehold interests of the Central in the Augusta and Savannah and the South Western Railroads), the Court said:

> "The cases of Rochester Ry. Co. v. Rochester, 205 U.S. 236, and Jetton v. University of the South, 208 U.S. 489, were urged as opposed to the conclusion reached but were thought not to control in view of the exceptional facts and language that had to be considered, as was recognized in Morris Canal & Banking Co. v. Baird, 239 U.S. 126, 132."

In *Morris Canal Co.* v. *Baird*, 239 U.S. 126, 132, the Court said, after citing the case of *Rochester Ry. Co.* v. *Rochester*, 205 U.S. 236:

> "The results in Wright v. Central of Georgia Ry., 236 U.S. 674, and Wright v. Louisville & Nashville R.R. Co., 236 U.S. 687, 690, were based upon the original charters, which were interpreted as contemplating and permitting subsequent transfers without subjecting the fee to taxation. Neither of these cases modifies the principles announced and applied in the opinion quoted from above—it is referred to with approval in the latter of them."

The fact that the Supreme Court of the United States in the case in 248 U.S. 525 held that the case of *Jetton* v. *University of the South*, 208 U.S. 489, was not controlling, is significant. In the University of the South case, the exemption from taxation was "as long as said lands belong to said University". The University leased the lands and it was held that the leasehold interest was taxable to the Lessee as property separate and distinct from the fee of the University, which was still protected by the Charter exemption. In the case at bar, as in the case of Central of Georgia Railway Company, decided in 248 U.S. 525, the tax limitation protected the Lessee as well as the Company which owned the railroad, because all interest in the property was taxed when the Charter rate was paid on the net income, the power of the State being exhausted.

XI.

The Contract is impaired if its value is diminished or if it is affected at all.

> "One of the tests that a contract has been impaired is that its value has by legislation been diminished. The applicable section of the Constitution of the United States provides that the contract shall not be impaired at all. It is not a question of degree, manner, or cause, but one of whether the subsequent legislation of the state encroaches in any respect on the obligation of the contract or dispenses with any part of its force."
>
> *Norfolk & W. Ry. Co.* v. *Boyle*, 12 F. Supp. 522, 523.

> "The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision

and the judicial power of this Court to redress the wrong."

Farrington v. *Tennessee*, 95 U.S. 679, 683.

"The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. In Green v. Biddle (8 Wheaton 84), it was said: 'The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its term by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation."

Van Hoffman v. *City of Quincy* 4 Wall, 535, 552, 553.

"The objection to a law, on the ground that it impairs the obligation of a contract, does not depend upon the extent of the change which the law may make in it." (h.n.2).

"Any deviation from its terms, by imposing conditions not expressed in the contract, however minute, and apparently immaterial in their effect, is within this constitutional prohibition." (h.n.3).

Winter v. *Jones*, 10 Ga. 190.

XII.

The case of Hale v. State Board, 302 U.S. 95, distinguished

This is the case on which the Supreme Court mainly rests its decision. It is wholly unlike the case at bar.

In the Hale case, under the Statutes of Iowa certain bonds were exempt from taxation and the Court assumed that the Statutes constituted a contract. The Supreme Court of Iowa construing these Statutes held

that the bonds were exempt, but that the income on the bonds was not exempt because at the time the Statutes were passed there was no general income tax law in Iowa. The Supreme Court of the United States elected to follow the decision of the Supreme Court of Iowa, although it was not bound to do so. The same argument cannot be made in the case at bar, because under the Georgia Railroad Charter the tax is specifically an income tax and the Supreme Court of the United States has held that under the Georgia Railroad Charter the property is exempt from tax. The Supreme Court of the United States has also held that no other mode or method of taxation, except the income tax, can be imposed under this Charter, and as no higher tax than one-half of 1% can be imposed, this tax when imposed is exhaustive of the power of the State.

While there was no general income tax statute in Georgia when this Charter was passed, the Legislature, as the Supreme Court of Georgia has said, must be presumed to have been familiar with the general subject. Certainly it would be a violent assumption to suppose that the Legislature imposed the income tax in ignorance of what it was doing.

Moreover, all railroad companies in Georgia were habitually taxed ½ of 1% on their net income, whether they had a charter contract or not, until 1874, when the method of taxing railroads was changed to a tax on their property ad valorem.

If in the Hale case the holders of the bonds *had been* taxed under a Statute of Iowa one-half of 1 per cent on the income of the bonds, and if this statute had been held to be a contract covering the whole liability

for taxation, an additional tax of 5½% could not have been imposed under a subsequent general income tax act. That is exactly the case here.

In *Wright* v. *Georgia Railroad & Bkg. Co.*, 216 U.S. 420, the State was seeking to tax the Georgia Railroad under a Franchise Tax Act which was passed in 1902 (Acts 1902, p. 37). There never had been any franchise tax in Georgia before this. In 54 Lawyers' Co-Operative Ed. p. 548, where this case is reported, the argument of John C. Hart and Samuel H. Sibley, representing Comptroller General Wright, is quoted as follows: "The fact that a franchise had never been taxed when the stipulations were made may explain why no agreement was made respecting it, but does not operate to hinder bringing within the power of taxation the new subject matter". The Supreme Court of the United States brushed this agrument aside, and adopted the argument of Mr. Joseph R. Lamar (subsequently one of the Justices of this Court), Counsel for the Georgia Railroad and Banking Company, quoted in 54 Lawyers' Co-Operative Ed. at p. 550 as follows: "The provision that the stock should be subject to an income tax not exceeding one-half of 1% on the net profits, by necessary implication prohibited any other subject or method of taxation." If the new franchise tax could not be imposed without violating the Charter, a fortiori, the new income tax of 1931 cannot be imposed without violating the Charter.

But, as we have argued elsewhere in this brief, it makes no difference whether the Charter tax is a property tax or an income tax, the tax having been imposed under the Charter up to the maximum, no other or additional tax whatever it may be called, can be imposed.

XIII

Other cases cited by the Supreme Court of Georgia and by Appellee, distinguished.

Clyde v. *Gilchrist*, 262 U.S. 94.

Adams Mfg. Co. v. *Storen*, 304 U.S. 307.

These two cases are similar to the case of *Hale* v. *State Board*, 302 U.S. 95, and are inapplicable for the same reasons set forth in the preceding point, which distinguishes that case.

Ex rel. *Cohn* v. *Graves*, 300 U.S. 308.

This case decides that "a State may tax her citizen upon the income he receives by way of rents from lands situate in another State and by way of interest on bonds secured by mortgage on lands situate in another State"; and it also decides that "a tax on the income from land is not a tax on the land". The first proposition is irrelevant and the last proposition supports our argument that the tax in this case is not a property tax.

Mason Co. v. *Tax Com. of Washington*, 302 U.S. 186.

This case merely decides that "a State Occupation Tax on gross receipts may constitutionally include the receipts from construction work done under a contract with the United States". There were only two questions in this case—one, whether the tax imposes an unconstitutional burden upon the Federal Government; and the other was, whether the area in which the work was performed was within the exclusive jurisdiction of the United States. This case does not seem to touch the case at bar.

Adams v. *Saenger*, 303 U.S. 59.

This case involved a question of what effect should be given in one State to the judgment of another State. The citation was probably a mistake.

Helvering v. *Bankline Oil Co.*, 303 U.S. 362.

Graves v. *O'Keefe*, 306 U.S. 466.

The first case involved the question whether a Federal tax on the profits from land leased from the State was invalid as an unconstitutional burden on a State instrumentality, and the second case involved the question whether the State of New York could tax the salary of a New York resident earned as Attorney for the Federal Home Owners Loan Corporation, which was a Federal instrumentality. These cases do not seem to remotely touch the case at bar.

New York Rapid Transit Corp. v. *State of N. Y.*, 303 U.S. 573.

In this case a privilege tax of 3% on gross income was imposed on the New York Rapid Transit Corporation. The question was whether this tax violated the contract of this corporation with the City of New York. The Court said on page 590: "We searched in vain for any provision in the contract which expressly exempts the corporation from the payment of this tax or indeed any tax", and again on page 591 the Court said "Not only is the corporation unable to point to an unmistakable exemption, but the contract itself contains an express provision permitting the deduction of taxes from the gross receipts".

U. S. Trust Co. v. Helvering, 307 U.S. 57.

This case is wholly irrelevant. The only question in the case was whether the proceeds of a war risk insurance policy payable to a soldier's widow should be included as a part of the soldier's gross estate for purposes of Federal estate taxes.

CONCLUSION.

For the reasons given above, it is believed that the decision of the Supreme Court of Georgia in this case should be reversed by this Court.

Respectfully submitted,

CARL H. DAVIS
(Wilmington, N. C.)

PHILIP H. ALSTON
(Atlanta, Ga.)

T. M. CUNNINGHAM,
(Savannah, Ga.)

Attorneys for Atlantic Coast Line Railroad Company.

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APPENDIX I

Extract from Sections 12 and 14 of Charter of Georgia Railroad Company (Acts 1833 pp. 262, 263).

Sec. 12 * * * "that the said company may, when they see fit, rent or farm out all or any part of their said exclusive right of transportation or conveyance of persons on the rail-road or rail-roads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned. And the said company, in the exercise of their right of carriage or transportation of persons or property, or the persons so taking from the company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers." * * *

Sec. 14 * * * "That whenever the company aforesaid shall see fit to farm out as aforesaid, to any person or persons, or body corporate, any part of their exclusive right of conveyance and transportation, or shall deem it expedient to open the said road or any part thereof, to public use, they shall and may adopt and enforce all necessary rules and regulations, and have power to prescribe the construction and size or burthen of all carriages and vehicles, and the materials of which such shall be made, that shall be permitted to be used or pass on the said rail road, and the locomotive power that shall be used with them." * * *

APPENDIX II

Acts of the Legislature of Georgia imposing Income Taxes on railroads.

The first mentioned of any tax on railroads in Georgia outside of the tax limitations which were conferred on railroads in their special charters (see Appendix III), is the Act of February 1, 1850 (Acts 1850, p. 378). At this time there were evidently only three railroads in operation in the State of Georgia — the Georgia Railroad, the Central Railroad, and the Macon and Western Railroad. The first two named had tax limitations in their charters, under which they were taxed one-half of 1% on their net income. The Macon and Western Railroad had no tax limitation. Section I of the Act provides that the President of the Georgia Railroad shall pay a tax for the year 1850 "one-half of one percent. on the net annual income of the stock of said road and its branches". Section II provides that the increase of the capital of the Georgia Railroad authorized "by the act of the present session of the General Assembly, be and the same is hereby taxed thirty-one and one-quarter cents on every hundred dollars worth". Section III provides that the Central Railroad shall pay a tax "one-half of one percent on its net annual income". Section IV provides that the Macon and Western Railroad shall pay a tax of thirty-one and one-quarter cents on each one hundred dollars of the amount of stock actually paid in. Section V of the Act provides that the banking capital of the Georgia Railroad and the Central Railroad shall not be exempt from future taxation "and the tax on net profits shall only be on the net profits of the Railroad".

Section VIII of the Act of December 11, 1858. (Acts 1858, p. 105) provides: "That the several Rail-

road Companies in this State, now, or that may hereafter be in operation, are hereby required, to make their returns to, and pay to the State Treasurer, in each year, on or before the 31st December, one-half of one percent., upon their net annual income of said Railroads".

Section V of the Act of December 14, 1861, (Acts 1861, p. 81) provides "That so much of the 646th and 647th sections of the Code as relates to the tax on Railroads, be repealed; and that in lieu of the same, the 8th section of An Act assented to December 11, 1858, taxing all Railroad Companies one-half of one percent. upon their net annual income, be continued in force".

The Code referred to in the Act last above stated is the Code which went into effect January 1, 1863, but was published in 1861. The sections of the Code which were repealed by the above stated Act of December 14, 1861, are mistakenly referred to in the Act of 1861 as Sections 646 and 647. The correct reference is 746 and 748. Section 746 provides "The several railroads and other incorporated or unincorporated companies of every kind, except banks, which are not exempt by their charter or otherwise, or for which there is not a different met od of taxation specially prescribed, pay the same rate percent. upon the whole amount of their capital stock paid in as is levied on other capital, together with the same rate percent. upon their net annual profits". Section 748 provides "The several railroads, by whose charters a higher tax is forbidden, and such as are now, or may hereafter be in operation, that do not pay a dividend exceeding six per cent., shall pay only one-half of one percent. upon the net annual income of each, until they

pay a dividend of eight percent. per annum, in which shall be included the reserved fund, at which time they are to be taxed as other capital".

There does not appear to be any Act of the Legislature from which Sections 746 and 748 of the Code were codified.

Section III of the Act of December 15, 1866, (Acts 1866, p. 165) provides: "That all national banks, railroad companies in operation whose charters do not forbid so high a tax, all express companies and insurance companies incorporated by the laws of this State, shall pay an annual tax of one-half of one percent. on their capital stock. Section VII of this Act of December 15, 1866 (Acts 1866, p. 166) provides "That all laws heretofore passed levying and collecting a tax upon income, be, and the same are hereby repealed."

Section I of the Act of September 28, 1868, (Acts 1868, p. 143) provides "That so much of the third section of the act approved December 15, 1866, as relates to the taxing certain railroad companies fifty cents on the one hundred dollars on their capital stock be, and the same is hereby, repealed, and that for the year 1867 the Comptroller General is directed to collect only such a percent. tax on the net earnings of the Atlanta and West Point and Macon and Western Railroads as is collected of the Central Railroad, the Georgia Railroad, the South Western Railroad, the Muscogee Railroad, the Brunswick and Florida Railroad, the Savannah and Albany Railroad, the Augusta and Savannah Railroad and the Milledgeville Railroads".

Section III of the Act of October 5, 1868 (Acts 1868, p. 154) provides "That all railroad companies,

incorporated in this State, shall pay an annual tax of one-half of one percent. on their net earnings".

Section 3 of the Act of March 18, 1869 (Acts 1869, p. 160) provides "That all railroad companies incorporated in this State shall pay an annual tax of one-half of one percent. on their net earnings".

Section III of the Act of January 19, 1872, (Acts 1872, p. 276) provides "That all railroad companies incorporated in this State shall pay an annual tax of one-half of one percent. on their net earning". Section VII of the same Act provides "That there shall be no tax on income other than that provided by Sections three and four".

Section III of the Act of February 20, 1873, (Acts 1873, p. 65) provides "That all railroad companies incorporated in this State shall pay an annual tax of one percent. on their net earnings".

Section III of the Act of February 26, 1874 (Acts 1874, p. 103) provides "That all railroad companies incorporated in this State shall pay an annual tax of one-half of one percent. on their net earnings".

The Act of February 28, 1874, (Acts 1874, p. 107) provided that from and after its passage all railroad companies in the State should be required to pay taxes on the value of their property. The title of this Act states that it is "to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this Act"; but nothing is said in the body of the Act about repeal of the charters of such companies. This is the Act which brought on all the litigation which subsequently ensued over the tax limitations of these railroad charters.

APPENDIX III.

Railroads Incorporated by the General Assembly of the State of Georgia which had a tax limitation in their charters of one-half of one per cent. on the net income.

Central Railroad and Banking Company of Georgia, Section 18, Act of December 14, 1835, p. 217. (This Company was originally chartered under the name of Central Railroad and Canal Company, Act December 20, 1833, p. 246).

Georgia Railroad Company, Act December 21, 1833, Sec. 15 (Name changed to Georgia Railroad & Banking Company, Act December 18, 1835, p. 181).

Brunswick & Florida Railroad Company, Act of 1835, Sec. 12, p. 192.

Chattahoochee Railroad Company, Act of December 21, 1835, Sec. 7, p. 193. (Name changed to Chattahoochee Railroad & Banking Company, Act December 30, 1836).

Louisville Railroad Company, Act December 29, 1838, Sec. 7, p. 170.

Augusta & Waynesboro Railroad, Act December 31, 1838, Sec. 13, p. 174. (Name changed to Augusta & Savannah Railroad, Act February 16, 1856, p. 185).

Talbotton Railroad Company, Act January 1, 1839, Sec. 14, p. 181.

Eatonton Railroad Company, Act January 1, 1838, Sec. 1, p. 191.

Muscogee Railroad Company, Act of December 27, 1845, Sec. 5, p. 116.

South Western Railroad Company, Act December 27, 1845, Sec. 14, p. 132.

Madison & Macon Railroad Company, Act December 29, 1847, Sec. 3, p. 173.

Columbus & West Point Railroad & Plank Road Company, Act January 22, 1852, Sec. 5, p. 133. (The Act of February 18, 1854, p. 415, to revive the charter of this company, took away the tax limitation.)

Atlantic & Gulf Railroad Company, Act February 27, 1856, Sec. 4, p. 158.

Macon & Brunswick Railroad Company, Act March 1, 1856, Sec. 3, p. 181.

Macon & Brunswick Railroad Company, Act December 17, 1857, Sec. IV, p. 71.

Milledgeville & Gordon Railroad Company & Eatonton Branch Railroad Company, Act December 13, 1859, p. 316. (Consolidated with Central Railroad & Banking Co. of Georgia and became a part thereof and subject to its charter).

Georgia Air Line Railroad Company, Act March 5, 1856, Sec. 4, p. 165.

There were a number of railroad companies chartered after January 1, 1863, which contained tax limitations in their charters, but charters granted after January 1, 1863 were revocable because the Code of Georgia which became effective January 1, 1863 provided, Sec. 1636, "In all cases of private charters hereafter granted the State reserves the right to withdraw the franchise unless such right is expressly negatived in the charter."

There were a number of railroad companies chartered prior to January 1, 1863 whose charters contained no tax limitation.